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No. 81287-0

 CLERK SUPREME COURT OF THE STATE OF WASHINGTON

LISA BROWN, Washington State Senator and Majority Leader of the  
Washington State Senate,

Petitioner,

v.

BRAD OWEN, Lieutenant Governor of the State of Washington,

Respondent.

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## PETITIONER'S ANSWER TO THE FOUR AMICUS BRIEFS

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**I. THE AMICUS BRIEFS DO NOT REFUTE PETITIONER'S  
SHOWING THAT THE 2/3 SUPERMAJORITY PROVISION  
IN RCW 43.135.035(1) IS UNCONSTITUTIONAL**

The Respondent interprets the simple majority specified in Article II, §22 to set only a “constitutional floor” for the passage of bills. If Respondent’s only-a-floor interpretation is correct, then it is constitutional for a statute to set a higher, 2/3 supermajority requirement for the passage of bills instead. Although the four amicus briefs support the Lieutenant Governor’s interpretation of Article II, §22, none refute the explanation in Petitioner’s July 14, 2008 Reply Brief (“Reply”) as to why the Lieutenant Governor’s interpretation is not correct.

**1. The amicus briefs fail to refute that the Lieutenant Governor’s interpretation of Article II, §22 does not make sense.**

Petitioner’s Reply explained that the Lieutenant Governor’s only-a-floor interpretation of Article II, §22 would make it constitutional for the legislature to pass a statute that imposes a 9/10 supermajority requirement on the passage of any bill that decreases taxes, as well as any bill that tries to reduce that 9/10 supermajority requirement. Such a supermajority statute would allow an 11% minority (e.g., 5 State Senators) to control whether the legislature ever lowers taxes in our State. None of the amicus briefs dispute that interpreting Article II, §22 to allow that result makes no sense.<sup>1</sup>

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<sup>1</sup> *Three amicus briefs completely ignore this fatal flaw in the Lieutenant Governor’s only-a-floor interpretation of Article II, §22, and the remaining amicus brief simply demands in a footnote (without any legal reasoning or authority) that the Reply Brief’s 9/10 supermajority example be disregarded.*

Nor do the amicus briefs refute that this 9/10 supermajority example illustrates why the Petitioner's interpretation is the one that makes sense. Under her interpretation, the bill passage clause of our State Constitution establishes that a simple majority is what passes a bill in our State's Constitutional framework. Not less. Not more. Simply a majority. And under that common sense, simple-majority interpretation of Article II, §22, a statute cannot set a higher 2/3 or 9/10 supermajority requirement instead.

**2. The amicus briefs do not refute that the Lieutenant Governor's interpretation of Article II, §22 contradicts democracy's basic premise: *majority* (not *minority* or *special interest*) rule.**

The amicus briefs do not dispute that imposing a supermajority requirement on the passage of bills allows a *minority* (rather than the *majority*) to determine if a bill becomes law.

Nor do they refute that such supermajority requirements run contrary to the fundamental principle of *majority* rule that underlies the basic framework of our democracy – which, as explained in Petitioner's Reply, is why the *Federalist Papers* described supermajority provisions as “a poison” (Alexander Hamilton), and scorned supermajority requirements because “It would be no longer the majority that would rule; the power would be transferred to the minority” (James Madison).<sup>2</sup>

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<sup>2</sup> The amicus briefs, moreover, misunderstand the phrase “*lex majoris partis*” as used by Jefferson in the Notes on the State of Virginia, for as his writings confirm, that phrase means law of the greatest part (i.e., “majority rule”) – not a quorum of the whole. And Jefferson took the fundamental importance of that principle of majority rule seriously – explaining, for example, that “The first principle of republicanism is that the *lex majoris partis* is the fundamental law of every society of individuals of equal rights; to consider

Instead, the amicus briefs claim that allowing the legislature to pass statutes that take control away from the majority and hand it over to minority interests is consistent with the distrust of the legislature voiced by some of the Washington Constitution's framers.

The amicus briefs are correct in that a primary "mischief" or concern of those framers was a distrust that the legislature would pass laws that grant special rights or power to wealthy minority interests. "The public's distrust of railroads, mining, and other corporations; concerns about special-interest control of government; and general objections to the concentration of power in elites led to a constitution that imposed numerous restrictions on the legislature, scattered executive authority among independently elected officials, intentionally hamstrung corporations, and provided strong protections of individual liberties."<sup>3</sup>

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*the will of the society enounced by the majority of a single vote as sacred as if unanimous, is the first of all lessons in importance, yet the last which is thoroughly learnt. This law once disregarded, no other remains but that of force, which ends necessarily in military despotism."* [1817 letter to F.H. Alexander Von Humboldt, quoted in *The Jeffersonian Cyclopedia*, John P. Foley, ed. (Funk & Wagnalls, 1900) at 526 (emphasis added)]. And thus, as Jefferson accordingly summarized, "The fundamental law of every society is the *lex majoris partis*, to which we are bound to submit." [1789 letter to David Humphreys, quoted in *The Jefferson Cyclopedia*, *supra*, at 526]. Indeed, the reason that it is also important that a quorum be undiminished is that if it is not, less than a true majority will rule – and eventually a small faction or oligarchy will rule. That is precisely the effect of a statute that imposes a supermajority requirement (be it 2/3 or 9/10) – for it results in less than a true majority (34% or 11%) deciding which laws pass and which ones do not.

<sup>3</sup> *The Constitutionalism of the American States* (George E. Connor & Christopher W. Hammons, Eds. 2008) at 771-72 (chapter on the Washington State Constitution by Hugh D. Spitzer). This suspicion did not mean the framers were anti-tax. Rather, public sentiment was that businesses such as railroads did not pay their fair share of taxes. Thus, the platform of Washington's People's Party included higher taxes and more government control over businesses. *Id.* at 774.



This Court has accordingly noted that our framers sought to “protect[] ... against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens,” and that “our framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority.” *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806, 808, 83 P.3d 419 (2005).

In short, our framers were concerned about protecting the majority from the few – not the few from the majority. “The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.” *Grant County*, 150 Wn.2d at 809; see also *Andersen v. King County*, 158 Wn.2d 1, 14-17, 138 P.3d 963 (2006) (emphasizing the framers’ focus on protecting the majority from control by the minority).

The interpretation of Article II, §22 demanded by the amicus briefs, however, accomplishes the opposite of those framers’ intent. It allows the legislature to enact a statute that grants a 1/3 (or 1/10) *minority* the power to impose its will on the *majority*. Interpreting Article II, §22 to place that power in the hands of the legislature allows the very mischief that the amicus briefs argue our framers were seeking to avoid.

The amicus briefs also cite cases such as *Bogert*, *Gordon*, and *Thurston* for their argument that a statute’s imposing a supermajority requirement on the legislature does not violate the corresponding majority-passage provision of the Constitution. But that was not the issue

those cases dealt with. Instead, they dealt with the issue of whether a State Constitution's imposing a supermajority requirement on citizen referendum measures dilutes citizens' voting rights in a way that violates the Equal Protection Clause of the federal Constitution's 14<sup>th</sup> Amendment.<sup>4</sup> Those cases accordingly do not even address (never mind refute) the showing in Petitioner's Reply that the supermajority statute in this case violates the majority-vote passage clause of Washington's State Constitution.

Consistent with our democracy's bedrock principle of *majority* (not *minority*) rule, Petitioner interprets Article II, §22 to provide that passage of a bill requires a majority. Not less. Not more. Simply a majority. The amicus briefs' emphasis on the framers' distrust that the legislature would pass laws granting special rights or power to wealthy minority interests supports the Petitioner's interpretation.

**3. The amicus briefs do not refute that when our State Constitution intends to create an exception allowing *minority* rule to control the passage of legislation, our State Constitution says so.**

The amicus briefs do not dispute that RCW 43.135.035(1) effectively supplements the simple majority provision of Article II, §22 to provide as follows:

**Passage of bills.** No bill shall become a law unless ... a majority of the members elected to each house be recorded thereon as voting in its favor, *with the exception that no bill that raises taxes shall become a law unless it receives a 2/3 supermajority vote in each house.*

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<sup>4</sup> *Bogert v. Kinzer*, 465 P.2d 639, 641 (Idaho 1970), *Gordon v. Lance*, 403 U.S. 1, 7 (1971), and *Thurston v. Greco*, 78 Wn.2d 424, 430, 474 P.2d 881 (1970).

Instead, they argue the framers would be comfortable with that supplementation because they set similar 2/3 supermajority requirements for other specific situations.

But the fact that the framers expressly specified the other situations where a 2/3 supermajority requirement (i.e., *minority* rule) would exist as an exception to our democracy's fundamental principle of *majority* rule confirms that those framers believed supermajority requirements are of constitutional (rather than merely statutory) significance.

The amicus briefs' discussion about how the framers intended to prevent the legislature from handing over special power or benefits to wealthy or well-connected minorities further supports this conclusion that when the framers intended to create an exception allowing *minority* rule to control the passage of legislation, they expressly said so. As for all other types of legislation, Article II, §22 provides that passage of a bill requires a majority. Not less. Not more. Simply a majority.

**4. The amicus briefs do not refute that the Lieutenant Governor's interpretation of the "negative phrasing" in Article II, §22 is the opposite of this Court's interpretation of such "negative phrasing" in Article II, §7 and Article III, §25.**

The amicus briefs do not dispute that our Constitution's framers used similar "negative phrasing" in the qualifications clause for State legislators (Article II, §7), the qualifications clause for State offices (Article III, §25), and the bill passage clause for State legislation (Article II, §22).

Nor do they refute that in *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998), this Court rejected the argument that the negative phrasing in Article II, §7 and Article III, §25 set only a minimum requirement that could then be supplemented or added to by statute.<sup>5</sup>

Instead, the amicus briefs argue that the framers' use of that same type of negative phrasing should be interpreted differently in Article II, §22 because democracy has a presumption that anyone should be able to run for office unless the Constitution expressly says otherwise. But the amicus briefs nowhere refute the dispositive point made in Petitioner's Reply that democracy has a similar presumption that *majority* (rather than *minority*) rule controls in a democracy unless the Constitution expressly says otherwise.

One of the amicus briefs also claims that this Court's 1998 *Gerberding* decision is limited by its 1933 decision in *Robb v. City of Tacoma*, 175 Wash. 580, 29 P.2d 327 (1933).

There is a reason why neither the Respondent, nor the Attorney General, nor the other amicus briefs made that claim. That reason is that the *City of Tacoma* case does not apply.

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<sup>5</sup> Although one of the amicus briefs attempts to neutralize this Court's holding in *Gerberding* by citing to *Griffiths v. King County*, 177 Wash. 619, 33 P.2d 94 (1934), that attempt lacks merit. Indeed, *Gerberding* effectively overruled *Griffiths*. See *Gerberding*, 134 Wn.2d at 213 (Sanders, J., dissenting) (objecting that the *Griffiths* case was on point and, if still valid, should have been dispositive). That same amicus brief also cites *Lenci v. City of Seattle*, 63 Wn.2d 664, 388 P.2d 926 (1964), in a footnote without any explanation. That lack of explanation is probably because *Lenci* addresses an entirely different concept – the scope of a city's power under Article XI, §11 to enact resolutions on a topic when the legislature has enacted legislation on that same topic.

*First*, the constitutional language in that case (Article III, §6) is materially different from the language in this case (Article II, §22). As the *City of Tacoma* opinion made clear, the Court's ruling in that case turned not on the negative phrasing in the first part of Article III, §6, but rather on the permissive "may be allowed" proviso in the second part of Article III, §6 – a proviso that does not exist in this case.<sup>6</sup>

*Second*, the legislative power at issue in that case (the legislature's authority over an entity that the legislature has the power to create and control – i.e., a municipal corporation) is materially different from the legislative authority at issue in this case (the legislature's authority over an entity that our State Constitution created and controls – i.e., the State Legislature). Unlike a municipal corporation that derives its existence and powers from the Legislature, the Legislature is a creature that derives its existence and powers from the Constitution – with its ability to change its powers to grant control to minority interests limited by that Constitution.<sup>7</sup>

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<sup>6</sup> *The following proviso qualified the negative phrasing in Article III, §6: "Provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum...." The City of Tacoma case held that the permissive "may" language in that proviso reserved to the Legislature the power to add a higher vote requirement: "The concluding proviso of section 6, art. 8, carries a very positive implication that the Legislature still has the power to fix an additional limitation. It says: 'Provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount....' It does not say 'shall be allowed,' but 'may be allowed,' indicating that the power conferred upon municipalities in this respect is not plenary and unconditional, but restrictive and subject to control by the Legislature." 175 Wash. 587-88. The City of Tacoma case accordingly was not a ruling on the negative phrasing in the first part of Article III, §6, but rather a ruling on the meaning and effect of the permissive "may be allowed" proviso in the second part of Article III, §6.*

<sup>7</sup> *The provision at issue in the City of Tacoma case (Article III, §6) relates to certain municipal corporations. That is significant because "Municipal corporations, as*

In short, Petitioner's interpretation of the "negative phrasing" in Article II, §22 is the one that is consistent with this Court's interpretation of such phrasing in Article II, §7 and Article III, §25. And the amicus briefs do not refute the straightforward conclusion that that phrasing should be consistently interpreted the same way in our Constitution.

**5. The amicus briefs ignore Michigan's interpretation of the similarly-phrased bill passage clause in its Constitution.**

The amicus briefs do not dispute that the Michigan Constitution's bill passage clause is phrased like Washington's.

Nor do they dispute the showing in Petitioner's briefing that the reasoning and conclusion of the Michigan Attorney General's formal opinion<sup>8</sup> interpreting that bill passage clause supports Petitioner's interpretation of Article II, §22.

Instead, they ignore that Attorney General opinion.

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*creatures of the state, derive their authority and powers from the state's legislative body." Campbell v. Saunders, 86 Wn.2d 572, 574-75, 546 P.2d 922 (1976); see also City of Spokane v. J-R Distributors, 90 Wn.2d 722, 726, 585 P.2d 784 (1978) (a municipal corporation "has neither existence nor power apart from its creator, the Legislature, except such rights as may be granted to municipal corporations by the state constitution.") The fact that the permissive language in Article III, §6 should be interpreted to not limit the power of the Legislature to enact statutes which impose additional requirements on such municipal corporations is entirely consistent with the plenary power that the Legislature has over the existence and powers of such municipal entities. Article II, §22, on the other hand, relates to the State Legislature itself— which is a creature created by the People of this State in Article II of our State Constitution. The City of Tacoma case accordingly has no bearing on whether Article II, §22 should be interpreted to limit the power of the Legislature to enact statutes that impose an additional supermajority requirement beyond the simple-majority specified by the Legislature's creator (the People) in our State Constitution.*

<sup>8</sup> 1998 Mich. OAG No. 6990, 1998 WL 477683.

**6. The amicus briefs do not refute the reasoning of Alaska's interpretation of its similarly-phrased bill passage clause.**

The amicus briefs do not dispute that the Alaska Constitution's bill passage clause is phrased like Washington's.

Nor do they dispute the showing in Petitioner's briefing that the reasoning and conclusion of the Alaska Supreme Court's interpretation of that clause supports Petitioner's interpretation of Article II, §22.

Instead, the amicus briefs argue that this Court should just ignore the Alaska Supreme Court's reasoning because Washington's framers read and considered the California Constitution instead of the not-yet-adopted Alaska Constitution, and an "interpretation" contrary to the Alaska Supreme Court's 2007 decision<sup>9</sup> was summarily asserted in a 1992 Court of Appeals case from California.<sup>10</sup>

But that basis for simply ignoring the Alaska Supreme Court's reasoning makes no sense. As Petitioner's Reply previously noted, this Court's 1998 *Gerberding* decision cited (and adopted) the Alaska Supreme Court's interpretation of the Alaska Constitution's negative phrasing when this Court interpreted the negative phrasing in our similar Washington Constitution. The amicus briefs provide no principled reason for this Court to now do the opposite and simply ignore the Alaska Supreme Court's reasoning here.

Nor, as explained in the following paragraphs, do the amicus briefs refute the weakness of the intermediate California decision they invoke.

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<sup>9</sup> *Alaskans for Efficient Government v. State*, 153 P.3d 296 (Alaska 2007).

<sup>10</sup> *People v. Cortez*, 6 Cal.App.4<sup>th</sup> 1202 (1992).

**7. The amicus briefs do not refute the flaws in the Lieutenant Governor's basing his interpretation of Article II, §22 on the intermediate California court ruling he cites.**

The amicus briefs insist that this Court repeat the same conclusion summarily asserted in *People v. Cortez*, 6 Cal.App.4<sup>th</sup> 1202 (1992). But that decision does not even address – never mind analyze or refute – the reasons explained in the Petitioner's briefing that support her interpretation of Washington's Article II, §22.

Nor do the amicus briefs address or refute the two reasons explained in Petitioner's Reply for why the intermediate court's summary conclusion does not apply to this case. First, as a legal matter, *Cortez* harmonized two interrelated provisions of the California Constitution dealing with the legislature and initiatives – which is not the legal issue in this case. And second, as a factual matter, the question of whether a 2/3 (rather than simple majority) requirement is constitutional was irrelevant in *Cortez* because the bill at issue had in fact received a 2/3 supermajority vote – which is what led the intermediate court to summarily dispatch with the plaintiff's challenge to the validity of that bill by stating: "Clearly a bill which obtains the approval of two-thirds of the membership of each house has also obtained the approval of a majority of the legislators in each house". 6 Cal.App.4<sup>th</sup> at 1212.

The amicus briefs simply do not refute the above flaws in basing any interpretation of Washington's Article II, §22 on the intermediate California court ruling they cite.



**8. In Short: the amicus briefs do not refute Petitioner's interpretation of Article II, §22.**

The arguments in the four amicus briefs do not change the answer to the underlying constitutional question in this case. The 2/3 supermajority requirement imposed by RCW 43.135.035(1) is unconstitutional under Article II, §22 of our State Constitution. Although that supermajority requirement can be added by constitutional amendment, it cannot be added by a statute.

**II. THE AMICUS BRIEFS DO NOT ESTABLISH A PROPER REASON FOR THIS COURT TO PUNT**

**1. The amicus briefs do not refute that separation of powers supports (rather than prohibits) the judicial branch being the branch that decides if RCW 43.135.035(1) is constitutional.**

The central issue in this case is the conflict between the simple majority specified in Article II, §22 of our State Constitution and the 2/3 supermajority specified in RCW 43.135.035(1). And as detailed in Petitioner's prior briefing, the Lieutenant Governor himself has acknowledged that "Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts."

The amicus briefs do not refute that conclusion. They provide no legal authority to dispute the showing in Petitioner's prior briefing that this Court has steadfastly maintained that one of (if not the) most fundamental functions of the judicial branch is to resolve Constitutional questions – holding that the "ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary," and that it

“is emphatically the province and duty of the judicial department to say what the law is, even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.”<sup>11</sup> As this Court explained in a prior case involving the meaning of Article IX that included the Respondent Lieutenant Governor as a Respondent, “Once it is determined that judicial interpretation and construction are required, there remains no separation of powers issue.” *Seattle School District*, 90 Wn.2d at 504-05.

**2. The amicus briefs do not establish that the political question doctrine prohibits the judicial branch from ruling on the constitutionality of RCW 43.135.035(1).**

One of the amicus briefs suggests that this Court should evade the merits of this dispute by invoking the political question doctrine.

That doctrine applies to certain disputes which turn on policy questions best left to the Legislature. See, e.g., *N.W. Greyhound Kennel Association v. State*, 8 Wn.App. 314, 321, 506 P.2d 878 (1973).<sup>12</sup>

The dispute in this case, however, does not relate to such legislative policy questions. It relates to a pure question of constitutional law: is the 2/3 supermajority provision in RCW 43.135.035(1) constitutional under Article II, §22 of our State Constitution? This is not a political question. It’s a legal question. And that is the type of question that is emphatically this Court’s role (and duty) to answer.

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<sup>11</sup> *Seattle School District v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (citations and quotation marks omitted).

<sup>12</sup> This doctrine is most applicable when the Legislature is exercising its police powers to protect public safety and morals. *N.W. Greyhound*, 8 Wn.App. at 321.

3. **The amicus briefs do not establish that the Declaratory Judgment Act's "justiciability" factors prohibit this Court from ruling on the constitutionality of RCW 43.135.035(1).**

The amicus briefs do not dispute that a ruling by this Court is the only way to finally and conclusively determine if the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional under Article II, §22. And as this Court explained in the previously-noted dispute involving the Respondent Lieutenant Governor and the meaning of Article IX, "Declaratory procedure is peculiarly well suited to the judicial determination of controversies concerning constitutional rights and, as in this case, the constitutionality of legislative action or inaction." *Seattle School District*, 90 Wn.2d at 490.

The amicus briefs nonetheless claim that this case does not satisfy the "justiciable" factors for such a declaratory judgment ruling because the Petitioner and Respondent agree with each other on the issue of whether Article II, §22 renders the 2/3 supermajority provision in RCW 43.135.035(1) unconstitutional. But as explained in Petitioner's prior briefing, the Lieutenant Governor (and the State Attorney General) emphatically argue that the statutory provision at issue is not unconstitutional, while the Petitioner emphatically argues that it is. Especially in light of all the amicus parties' lengthy briefing in support of the Lieutenant Governor's position (and against the Petitioner's), one cannot credibly claim that there is no adversity or disagreement in this case on the issue of whether the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional.

The amicus briefs also assert that this case does not satisfy the “justiciable” factors for a declaratory ruling because the Petitioner and Respondent do not have any real interest in this case’s resolution.

But the amicus briefs do not refute the strong interests of the Petitioner (and the citizens who elected her to represent them) that are outlined in Petitioner’s Reply – including their fundamental interest that Petitioner’s vote not be disregarded or nullified by an unconstitutional statute.

Nor do the amicus briefs refute the interests of the Respondent that are outlined in Petitioner’s Reply. Indeed, the zeal of the Respondent’s defense of the constitutionality of the statute at issue confirms the strength of the Respondent’s interest in opposing the constitutional interpretation advanced by the Petitioner in this case.

The reason courts require adverse legal interests in a declaratory judgment case is to assure that the court has before it a tangible enough controversy to focus the issue for concrete resolution.<sup>13</sup> And in this case, that concrete controversy exists.

The amicus briefs also suggest that this case’s controversy over the constitutionality of Washington’s 2/3 supermajority statute is now moot because this Court denied Petitioner’s motion for accelerated review, and

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<sup>13</sup> See, e.g., *Moore Corp. Ltd. v. Wallace Computer Services*, 898 F.Supp. 1089, 1095 (D.Del., 1995); *Int’l Longshoremen’s & Warehousemen’s Union, Local 37 v. Boyd*, 347 U.S. 222, 223-24, 74 S.Ct. 447, 448, 98 L.Ed. 650 (1954) (without adversity, issues may be too abstract to adjudicate); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242, 61 S.Ct. 510, 85 L.Ed. 826 (1937) (there is an actual controversy for purposes of declaratory judgment where one side claims a right and the other side denies it).

the Spring 2008 legislative session which voted on Senate Bill 6931 is now over.

But the amicus briefs do not refute (or even address) the showing in Petitioner's Reply that the record in this case establishes this constitutional controversy is not moot – a record which confirms that this case “involves ‘matters of continuing and substantial public interest’, that “there is a need for a judicial determination for future guidance of public officers” such as the Respondent Lieutenant Governor, and that there is a “likelihood of future recurrences of the issue.”<sup>14</sup>

**4. The amicus briefs do not refute that this is a proper “mandamus” case for this Court to resolve.**

**(a) *The amicus briefs do not refute that this case presents one of the classic mandamus situations where this Court rules on the merits.***

The amicus briefs do not dispute the showing in Petitioner's prior briefing that

- this case presents no fact issues for superior court fact finding;
- only this State Supreme Court can conclusively answer the constitutional question of whether the 2/3 supermajority provision in RCW 43.135.035(1) violates Article II, §22;
- the resolution of that underlying constitutional issue has broad public import that affects our State at large; and
- that resolution turns upon this Court's interpretation of the constitutional authority to pass laws that Article II, §22 vests in our

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<sup>14</sup> See also ASF000125 (Respondent's March 4 Response in opposition to Petitioner's motion for accelerated review, asserting to this Court that because of those facts, this controversy satisfies the exception to the mootness doctrine established by Matter of Eaton, 11 Wn.2d 892, 895, 757 P.2d 961 (1988)); ASF000130 (Petitioner's March 4 Reply agreeing with the Respondent's Response that this controversy satisfies the legal criteria for the exception to the mootness doctrine if Petitioner's suit was not decided before the March 13 end of the legislative session).

citizens' duly elected representatives, and the corresponding constitutional duty of a State Officer (the Lieutenant Governor) to approve all bills passed by the Senate.

The amicus briefs accordingly do not refute that this case presents one of the classic situations where this Court addresses the merits of the original jurisdiction mandamus action brought before it under the *Pacific Bridge*, *State Labor Council*, and *Hinkle* decisions discussed in Petitioner's Reply.<sup>15</sup>

Instead, the amicus briefs ignore this basis for this Court's resolving this dispute on the merits. They argue that the constitutionality of the 2/3 supermajority provision in RCW 43.135.035(1) should be resolved through a declaratory judgment suit filed in Superior Court (rather than a mandamus suit filed in this Court) for the two reasons. But as outlined below, neither reason supports the punting of this dispute to the Superior Court for a return later on.

**(b) *The amicus briefs do not establish that the Lieutenant Governor has the "discretion" to violate RCW 43.135.035(1) or declare it unconstitutional.***

The amicus briefs claim this Court should not resolve the underlying legal issue in this case because the Lieutenant Governor's decision to comply with RCW 43.135.035(1) (instead of declaring that statute unconstitutional or approving bills in violation of that statute's 2/3 supermajority provision) was a "discretionary" decision.

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<sup>15</sup> *Pacific Bridge Co. v. Washington Toll Bridge Authority*, 8 Wn.2d 337, 1121 P.2d 135 (1941); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 65 P.3d 1203 (2003); *State v. Hinkle*, 131 Wn. 86, 229 P. 317 (1924).

The amicus briefs' calling the Lieutenant Governor's compliance with RCW 43.135.035(1) a "discretionary" act or a "point of order" ruling does not change the fact that RCW 43.135.035(1) is currently a Washington State law, and our State's public officials are not above the law. The amicus briefs cite no legal authority for their proposition that our State's public officials lawfully have the "discretion" to violate State statutes at their choosing, or lawfully have the authority to declare statutes unconstitutional.

Indeed, the lack of any such lawful authority is precisely why the Lieutenant Governor unequivocally described his action as a *non-discretionary* one that he was *compelled* to take, explaining that "Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts. ... For these reasons, [the Lieutenant Governor] believes he *lacks any discretion* to make such a ruling, and he explicitly rejects making any determination as to the Constitutionality of [RCW 43.135.035(1)] and instead is *compelled* to give its provisions the full force and effect he would give any other law."<sup>16</sup>

- (c) *The amicus briefs do not establish that "appeals" to the Senate as a whole provide the single Petitioner in this case a legally sufficient remedy to resolve the fundamental constitutional issue in this case.*

The amicus briefs also argue that the single Senator who is the Petitioner in this case should have used the "alternative remedy" of

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<sup>16</sup>ASF000020; same quote at ASF000084-85 (bold italics added).

appealing to the full Senate to ask it to “overrule” the Lieutenant Governor’s decision to comply with RCW 43.135.035(1) instead of declaring that statute unconstitutional.

But the amicus briefs do not refute the prior showing in Petitioner’s Reply that such “appeals” to the legislative body as a whole are not only legally futile (because the full Senate has no more authority to declare a statute unconstitutional than the Lieutenant Governor does), but are also legally unnecessary under this Court’s veto-challenge case law. This simple fact remains that this Court, and only this Court, can resolve the parties’ dispute as to whether or not the 2/3 supermajority provision of RCW 43.135.035(1) is unconstitutional under Article II, §22.

### **III. CONCLUSION**

The 2/3 supermajority provision in RCW 43.135.035(1) is either constitutional or it is not.

The four amicus briefs do not refute the Petitioner’s showing that that 2/3 supermajority requirement is not constitutional. The Lieutenant Governor accordingly had no legal right or authority to refuse to forward Senate Bill 6931 on to the House as “passed” based on the fact that it did not receive the 2/3 supermajority specified in RCW 43.135.035(1). And the Lieutenant Governor similarly has no legal right or authority to refuse to forward any other Senate bill on to the House as “passed” based on the fact that that bill did not receive the 2/3 supermajority specified in RCW 43.135.035(1).



The four amicus briefs also do not refute the Petitioner's showing that no legitimate purpose is served by once again putting off the resolution of this case's underlying constitutional dispute for yet another day. Consistent with the Respondent Lieutenant Governor's and State Attorney General's admission that this controversy is of such continuing and substantial public import that it satisfies the exception to the mootness doctrine, this Court should resolve the constitutional dispute at issue with the three rulings specified at the Conclusion of Petitioner's July 14 Reply Brief.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of August, 2008.

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1. Petitioner's Answer To The Four Amicus Briefs

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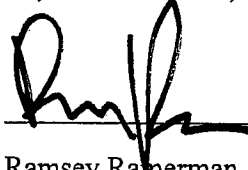
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I certify under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 29th day of August, 2008 at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Ramsey Ramerman', is written over a horizontal line.

Ramsey Ramerman, WSBA #30423

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